No. 20280

In the

United States Court of Appeals

For the Ninth Circuit

R. B. RANDS, et ux,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

On Appeal from the United States District Court
for the District of Oregon

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DAILY JOURNAL OF COMMERCE
20

INDEX

TABLE OF CASES CITED

TABLE OF CASES CITED (Cont.)

STATUTES CITED

STATUTES CITED (Cont.)

PAGE

of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by a motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, effective March 19, 1948; Dec. 29, 1948, effective Oct. 20, 1949.....5, 6, 9, 44

Rule 71A 2, 6, 9, 43, 44, 45, 46, 48

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

* * *

(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve a notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of his property, he shall serve his answer within 20 days after the serving of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

33 U.S.C. § 403 (1958):

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead,

STATUTES CITED (Cont.)

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STATUTES CITED (Cont.)

OTHER CITATIONS

No. 20280

In the

United States Court of Appeals

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R. B. RANDS, et ux,
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v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

On Appeal from the United States District Court
for the District of Oregon

JURISDICTION

Jurisdiction of this Appeal is founded on 28 U.S.C. § 1291 (1958) wherein it is provided:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court.

The opinions of the District Court are unreported. They are found in the Record, at 22, 35, 38 and 68.

Notice of appeal was filed and the appeal was docketed in this Court. Record at 69, 74 *et seq.*

QUESTIONS PRESENTED

I. Whether the constitutional requirement of full market value in the highest and best use of condemned uplands may be diminished by the navigation power so as to require less than full compensation?

A. Whether the location of lands next to water must be disregarded to comply with the rule that power site value of lands and flow value of water must be disregarded in condemnation?

B. Whether, assuming the power to deny compensation, policy is found in Acts of Congress indicating that full compensation is to be paid?

II. Whether Rule 71A of the Federal Rules of Civil Procedure stands alone to prescribe procedure for condemnation cases, without regard to the provisions of the other Rules allowing extensions of time for excusable neglect?

STATEMENT OF FACTS

Appellants own lands on the Columbia River at the site of the historic Castle Rock Landing. This land is and has been through past years bordered by high water, sufficient to permit navigation close to the shore. (Record, hereinafter R., at 54) The location is upriver from the John Day Dam, under construction; it now forms

a part of the "Boardman Space Age Park," an industrial development project of the State of Oregon.

The State of Oregon began seeking lands for this project when it learned, about six years ago, that a major aeronautical company might be induced to locate a testing operation in Eastern Oregon. (R. at 49). The state commenced a site search which culminated in the negotiation of a lease and option to purchase the Appellants' lands (R. at 50.) The option price was approximately $35,840. (Computed from R. at 56, 57.)

The option was relinquished when the state found it could acquire the land through the use of the federal power of eminent domain, in connection with construction of the John Day Dam. Meanwhile, Oregon had arranged with the federal government an exchange of the Boardman bombing range, the bulk of the "Space Age Park" for state-owned lands elsewhere in the state.

Before Oregon acquired the tract desired for the development project, it had already made a lease (on July 2, 1963) of the property described in the federal government's quitclaim deed. (R. at 58-65.) The lease, but not the appendices thereto, is set forth in full in Appendix A of this Brief. The lease payment is $60,000 per year. (Appendix A at 66) Oregon paid $17,500 for the property, according to the federal deed of Sept. 25, 1963. (R. at 58, 64.)

On August 13, 1963, the United States Government filed a declaration of taking in condemnation of certain lands situated along the Columbia River south shore, in the State of Oregon. (R. at 10.) Title was claimed under the provisions of 40 U.S.C. § 258a (1958), which provides that the declaration of taking must declare that "lands are thereby taken for the use of the United States." The Government failed to use the statutory language.

Notice of the taking which specified the 20 day period for answer designated by the Federal Rules of Civil Procedure was served on the Appellants. Appellants filed a notice of appearance, contesting the amount of proposed compensation. (R. at 28.) It had not at this point become apparent to Appellants that grounds existed for challenging the authority of the government to take the land. The initial appearance on behalf of Appellants was made by the firm of Mahoney & Abrams, of Heppner, Oregon. Subsequently consultation was had with the firm of Dusenbery, Martin, Beatty and Parks, in Portland, Oregon. Because of circumstances beyond the control of Appellants, consultation was after the 20 day period allowed by the Rule for making objection to the validity of the taking.

Within 39 days of receipt of the Notice of Taking, Appellants filed a Motion to Amend the Notice of Ap-

pearance, relying on the "excusable neglect" provisions of FED. R. CIV. PROC. 6(b) and 60(b), accompanied by an affidavit reciting the facts stated above, and accompanied by a memorandum with Supplemental Points and Authorities specifying the grounds of objection to the taking which Appellant sought to raise in its Answer (R. at 31.) The government, as Plaintiff, and through the Acting United States Attorney, Sidney Lezak, and Assistant United States Attorney Joseph E. Buley, filed a Memorandum in Opposition to Motion to Amend which generally stated that Rule 71A alone was applicable to the filing of an answer in a condemnation case, but concluded with the statement:

> It is the government's view that the affidavit on file in support of the motion does show circumstances which in justice to the defendants should allow them to now file an answer after the twenty days from the service have elapsed.

Apparently the government's position was that legally there was no requirement that the Defendants-Appellants be allowed to amend but that justice in the particular case would be served by allowing the amendment. The government's Memorandum in Opposition took no position on the question of detrimental reliance by the Government on lack of opposition within the twenty day period, and indeed made no reference to the

fact that the Government deeded part of the land in question to the State of Oregon two days before Defendant-Appellants filed their motion to amend. On October 16, 1963, the Honorable John F. Kilkenny, Judge of the United States District Court for the District of Oregon, entered an order denying Appellants' Motion to Amend, on the ground that (1) FED. R. CIV. PROC. 71A (e), concerning eminent domain takings, is not subject to the general authority for discretionary extensions of time contained in FED. R. CIV. PROC. 6 (b) and 60 (b); and (2) that even if those Rules apply, discretion demanded denial of the Motion in this case because a portion of the land in question had been deeded by the Secretary of the Army to the State of Oregon two days prior to the filing of Appellants' Motion to Amend. (R. 35-37.)

The highest and best possible use of the lands taken from Appellants was as a port site. Generally private port site land is not readily available along the Columbia River—land otherwise suitable for ports is either owned by the Government or blocked from land access through the tracks of the Union Pacific Railroad on the Oregon shore, and the Seattle, Portland and Spokane Railroad on the Washington shore. Appellants' lands, however, were and are accessible from land and suitable for use as a port, whether or not the John Day Dam, under construction in the area of Appellants' lands,

vas ever built. The lands border the high water line of the Columbia River for a substantial distance in an area with sufficient deep water so that they were and now are suitable for use as a port. (R. at 54)

Appellants sought to establish this fact and the resultant value of the land in its highest and best use as a port site, at the trial on compensation. But it was ruled by the Honorable John F. Kilkenny, Judge of the United States District Court for the District of Oregon, in advance of trial, that the value of the lands as a port site was not a compensable interest because it was subject to the overriding navigational servitude in the United States. (R. at 38-39)

SUMMARY OF ARGUMENT

It is clear that the Government may act as it chooses within the bed of a stream, when it acts under its power over navigation, without the requirement of paying for consequential damage to uplands. It is also clear that uplands, when condemned, may not be valued for use as a power dam site, even though this be the highest and best use of the lands. But it is unreal and not required by the power site doctrine to value lands as though they were located away from water when in fact they are located on water and have value as a port site. An important distinction in the Government power is found in the degree of statutory control over power dam con-

struction, compared to the degree of control over por development. Affirmative findings are necessary for the power dam development, and even then a license is granted subject to many conditions. But only a finding that an obstruction to navigation will be created is sufficient to deny the right which the riparian owner otherwise has to use his lands as a port site.

The power site cases have distinguished value as between private persons from the value as between the Government and the private owner. But in the case of port site development, the Supreme Court has held that as between the Government and the private riparian owner, the right to use lands adjoining a river as a port site does have value, even though the Government could diminish the value by a proper exercise of the navigation power. The point is that the Government has not used its navigation power to diminish the fair market value in a non-compensable fashion. Rather it has taken the whole property at its undiminished value.

Additional support in favor of full compensation here is found in the congressionally declared water policy for the western states, granting more rights to western riparian owners than is otherwise the case. And further, policy is found in the Submerged Lands Act which, though reserving the navigation power, grants all rights of development of lands to the states or

the private owner claiming through the state, excluding only the power site value. The fair implication from this is that port site value is not excluded, but rather is confirmed in the private owner, subject only to navigation power exercise.

Condemnation proceedings in this case were conducted subject to FED. R. CIV. PROC. 71A. That Rule makes all the rest of the Rules applicable to a condemnation case, except at the point of a conflict. FED. R. CIV. PROC. 60 (b) and 6 (b) both allow extensions of time, even after prescribed time has lapsed, upon a showing of excusable neglect. While these rules, read together, require the judge to consider the merits of granting an extension of time, the District Judge ruled that the provisions of Rule 71A stand alone, and did not consider the merits of Appellants' request for extension of time.

ARGUMENT

I. The constitutional requirement of full market value in the highest and best use of condemned uplands may not be diminished by the navigation power to make compensation less than full.

A. The location of lands next to water need not be disregarded in order to comply with the rule that power site value of lands and flow value of water are to be disregarded in condemnation.

FIFTH AMENDMENT just compensation for waterfront property is the primary point of this case. The government urges that two relatively recent Supreme Court decisions, *United States v. Virginia Elec. Power Co. [Vepco]*, 365 U.S. 624 (1961); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956), bar full compensation here.

Justice Douglas has described the problem:

> Basically the problem in this case is to locate a workable and reasonable boundary between Congress' power to control navigation in the public interest and the rights of landowners adjacent to navigable streams and their tributaries to compensation for injuries flowing from the exercise of that power. The Constitution does not require compensation for all injuries inflicted by the exercise of Congress' power. Neither is the power unlimited. The line therefore must be drawn in accommodation of the two interests.

United States v. Kansas City Life Ins. Co., 339 U.S. 799, 812, 813 (1950) (dissenting opinion).

The reason why boundary location is becoming more acute is explained in part by Chief Judge Hutcheson of the Fifth Circuit:

> This is a period of great governmental expansion, with enormously stepped up numbers of takings of private property for public use by expropriation, a streamlining of the procedures for taking, and, because familiarity breeds contempt, a consequent

> growing and, therefore alarming attitude of complacency, instead of viewing with alarm, with which government and public alike look upon the exertion of the power of eminent domain by which all that a man has can be taken from him by force. [Footnote omitted.]

Slattery Co. v. United States, 231 F.2d 37, 41-42 (5th Cir. 1956). That case involved an appeal by condemnees from a District Court judgment based on appraisal of the land by appointed Commissioners. The Fifth Circuit reversed because the Commission had not made proper findings.

Since the case is one of a taking for a navigational purpose, we start with the proposition that the Federal Government has almost absolute power over navigation and navigable waters, including the Columbia River, through the constitutional power over interstate and foreign commerce.

But the extent of power claimed by the Government in the present case is not generally available under the commerce clause.

> It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone.

United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950).

The "classic description" (*Vepco, supra*, at 628) of the scope of the power is found in *United State v. Chicago, M. St. P. & P.R.R.*, 312 U.S. 592, 596-97 (1941):

> The dominant power of the federal government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must take compensation. [Citations omitted.] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

It must be noted that even within these limits. the exercise of the power must be in furtherance of the purpose for which the power exists, that is, in furtherance of navigation. *International Paper Co. v. United States*, 282 U.S. 399 (1931); *United States v. 50 Foot Right of Way*, 337 F.2d 956 (3d Cir. 1964). The very case which set forth most clearly the rights of the Government to act in furtherance of navigation without payment of compensation to those previously occupying the bed of a navigable stream, and upon which *Twin City Power*, *supra*, and *Virginia Elec. & Power Co.*, *supra*, is strongly base reaffirmed that the legal *title* to

the bed of the stream is either in the state or the riparian owners, depending upon state law. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913).

International Paper, *supra*, awarded compensation for the exact value for which *Chandler-Dunbar* denied compensation, the value in the flow of the stream. The reason was that International's rights to the water under New York law were curtailed by the federal government in a taking under the war powers, and not under the navigation power. The Court commented, in denying the government's argument that the water right was a mere revocable license, that "the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end." *Id.* at 407.

The *50 Foot Right of Way* case, *supra*, involved lands between high and low water mark over which a pipeline had been built during World War II, under war powers. The lands between high and low water are absolutely subject to federal control for navigational purposes, *United States v. Chicago, M. St. P. & P.R.R.*, 312 U.S. 592 (1941), but the pipeline taking had not recited, nor did the statutory authority refer to, the navigation power. The Third Circuit awarded compensation to the riparian owner of the lands between high and low water since

his title was limited only by the navigational servitude, which was not applicable.

The extent of the riparian owner's right in his lands was described in *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900):

> Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable river, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all time subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

There is no doubt that proper government exercise of the navigational servitude within the bed of the stream may cause real economic loss to a riparian owner. This is not taking within the meaning of the fifth amendment because the damage is consequential. Similarly government action within the bed of a stream, under its navigation power, may diminish riparian rights inherent in ownership of uplands or fast lands without the necessity for compensation because there has been no taking. See, *e.g.*, *United States v. Commodore Park*, 324 U.S. 386 (1945); *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915); *Scranton v. Wheeler*, 179

U. S. 141 (1900); *Gibson v. United States*, 166 U.S. 269 (1897).

Each of those cases involved damage to uplands caused by navigational improvement within the bed of the stream. In both *Scranton* and *Gibson* the property of the riparian owner was made less valuable when the Government constructed docks and wharves which blocked convenient access from the uplands to the navigable waters. Greenleaf-Johnson Lumber Co. owned a dock which had been lawful, but was ordered destroyed without compensation when the harbor line was moved back. In *Commodore Park* material dredged from a bay was deposited in and across a small navigable stream which fronted the claimant's property. Residential property had its navigable water destroyed; this fresh tidal stream was turned into a stagnant pool, with consequent reduction in value of the land. But in each of the cases there was no taking, the injuries were consequential resulting from exercise of the navigational servitude *within* the navigable waters, and compensation was not constitutionally due.

As a result of this power over navigation, there is no private right in the *flow* of a stream—*i.e.*, in the water power inherent in the flow of the stream. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913). There the power company had structures

required for its hydro-electric generating capacity located within the bed of the stream. The structures were ordered removed; the Court denied compensation for the value in energy of the flow of the St. Mary's River, in which they were located, or for the value of the structures themselves. In addition to the general principle of the navigable servitude which permitted this order of removal without compensation, the permits allowing the structures were expressly made revocable with or without cause by the Secretary of War.

Chandler-Dunbar was the leading case on the subject until *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) was decided. The power company had assembled much of the land needed to construct a hydroelectric power project on the Savannah River. Permission of the Secretary of War and licenses from the Federal Power Commission had been obtained, but the licenses were allowed to lapse, and reinstatement was not sought until after the United States had determined to build the project itself. Compensation was sought and denied, for the value of the uplands as a site for the dam. Justice Douglas, speaking for the Court, said:

> It is argued however, that the special water-rights value should be awarded the owners of this land since it lies not in the bed of the river nor below high water but above and beyond the ordinary high-water mark. An effort is made by this argument to establish that this private land is not

burdened with the Government's servitude. The flaw in that reasoning is that the landowner here seeks a value in the *flow of the stream*, a value that inheres in the Government's servitude and one that under our decisions the Government can grant or withhold as it chooses. It is no answer to say that payment is sought only for location value of the fast lands. That special location value is due to the flow of the stream; and if the United States were required to pay the judgments below, it would be compensating the landowner for the increment of value added to the fast lands if the flow of the stream were taken into account.

That is illustrated by *United States v. Chandler-Dunbar Water Power Co.* [citation omitted], the case that controls this one.

350 U.S. at 225-26.

The next and most recent significant opinion by the Supreme Court in this area is *United States v. Virginia Elec. & Power Co. [Vepco]*, 365 U.S. 624 (1960). A flowage easement over fast lands which Vepco had acquired in anticipation of building a private dam was taken. The sole question was compensation; the easement was indisputably property. But the Government (and a dissent by Justices Whittaker and Black and Chief Justice Warren, 365 U.S. at 638) urged that the only value which this flowage easement had was in conjunction with a private exercise of a right to back up waters and flow them over the lands subject to the easement, a value which the Government had termi-

nated. The majority, however, found that the easement had "destructive value" in the rights which the easement gave Vepco as against the owner of the subservient fee. *Id.* at 630. The owner of the subservient fee had conveyed the fee to the government for $1. The Court was obviously struck by the manifest injustice were the government's position adopted: "[C]ompensation could be denied the fee owner because he had already conveyed the flowage easement [citation omitted], and denied the owner of the easement because it was valueless against condemnation by the United States. The Government would thus destroy the entire property interest in fast lands without compensation." *Id.* at 631.

The dissent answered this by contending: "the law requires us to say: Exactly so." *Id.* at 643.

Twin City was a strong re-affirmation of *Chandler-Dunbar*. But while that case denied value for water power, it granted location value to lands adjacent to the St. Mary's River which were taken for lock and canal purposes. The *Twin City* dissent, 350 U.S. at 229 (four justices), cited particularly the lock and canal lands award in *Chandler-Dunbar*, concluding that the majority opinion "extend[s] the Government's navigation servitude far above and beyond the high-water mark . . ." 350 U.S. at 245.

After reading the *Twin City* dissent, one writer has

concluded that the portion of *Chandler-Dunbar* dealing with value for lock and canal purposes was overruled *sub silentio* by the majority opinion. Fairman, *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 131, 132 (1956). But Fairman did not mention, and his conclusion does not seem to give any effect to, a footnote on canal and lock lands in the *Twin City* majority opinion. 350 U.S. at n. 1, 226. The *Twin City* footnote explained the lock and canal award:

> It may be that the Court was influenced by the fact that, on the special facts of the case, the use of the land for canals and locks was wholly consistent with the dominant navigation servitude of the United States and indeed aided navigation. Whatever may be said for that phase of the case, it affords no support for respondent, since water-power value, held to be compensable by the Court of Appeals, was ruled to be non-compensable in the Chandler-Dunbar Case.

It is difficult, if not impossible, to distinguish the location value of lock and canal lands in *Chandler-Dunbar*, from the use of lands for a port site, which similarly is in aid of navigation. The definite exception for water power value, emphasized in the quoted footnote, is in accord with a statutory exception for water power value made in the Submerged Lands Act, 43 U.S.C. § 1301 (e) (1958), discussed in more detail below at 38-40 of this brief.

Fairman had this comment on *Twin City:*

The government's argument in these cases is plausible on its surface. The United States can deprive the land of its power site value without compensation by diverting the waters or refusing to permit the building of a dam. A subsequent condemnation would require payment only for the diminished value. It is then contended that the result should not be different if the condemnation is contemporaneous with the termination of the private opportunity. This argument disregards the traditional concept of a "taking" within the meaning of the fifth amendment. The destruction of the value in the first instance is not compensable because it is not such a taking; when the taking is later accomplished by condemnation, the value has already been reduced. But when both destruction of value and condemnation occur at the same time, the worth of the property is not diminished prior to the taking, and just compensation would seem to include the undiminished value.

Whatever the merits of the government's contention, the effect of these decisions is to extend the government's servitude in the flow of the stream so that the servitude includes the value which the presence of the flow imparts to adjoining property. This result was reached without discussion of the consequences which logically follow. The government's argument, for example, might require an irrigated farm to be valued as desert land. By permitting the government to base its argument on the hypothesis that it would exercise arbitrary power, the Court ignored the improbability of such arbitrary action, and the sanctions, both judicial and political, which may follow upon capricious destruction of property value.

70 HARV. L. REV. at 132.

Some inconsistency between *Twin City* and *Vepco* has been suggested. Bickel, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 41, 125 (1961). *Contra*, Note, *Compensable Value "Taking" of Dam Site*, 14 STAN. L. REV. 800, 804-06 (1962) (decisions reconciled with Hohfeldian analysis of correlative rights and duties of owners of easement and fee). Bickel said:

> In *Twin City* the Court relied on the fact that the government's decision to undertake the river project destroyed the power-site value of the land being condemned. If the effect of the government's intervention were to be taken into account in *Virginia Power*, the value of the easement would virtually disappear, for in the absence of some program for private power development, the easements would be saleable only to those who for some reason wished to obtain clear title to the subservient fee. Conversely, the *Virginia Power* reasoning, that the prospect of governmental intervention be discounted, suggests that some recognition should be given to the potential power-site value of the property. The Court's formula for appraising the value of the easement illustrates the inconsistency with the *Twin City* rationale. Adopting the formula laid down by the Fifth Circuit in *Augusta Power Co. v. United States* [278 F.2d 1 (5th Cir. 1960)] the Court held that the non-riparian value of the unencumbered fee must be apportioned between the easement holder and the owner of the fee, according to the probability of the easement's exercise; thus, as the likelihood of private development decreases, the value of the easement is reduced. In assessing this probability, the government's intervention, which makes the easement's exercise impossible, is to be disregarded. This formula recog-

nizes as compensable the value attributable to riparian uses because it explicitly takes into consideration the possibility of private use of the water. Once riparian values are recognized, there is no rational justification for restricting the maximum recovery to the non-riparian value of the property as was done in *Twin City*. But the reaffirmance of this maximum limit in *Virginia Power* suggests that the holding of *Twin City* will not be overruled.

However it is not necessary to question in the slightest degree the holdings in either *Twin City* or *Vepco* to see factual and legal distinctions between the private dam development there thwarted and the private port lands here taken which support full compensation for the taking of port site lands.

In the first place, the character of the use itself is physically different. The value inherent in a dam site is value which comes, as Justice Douglas observed, in the flow of waters. And as far as value for a dam site goes, power in the flow, the rate and quantity of water, is essential. Here there is nothing so tied to the fact of water moving with power past the lands taken. Admittedly water is necessary; indeed, water which is burdened with the navigation servitude is necessary for there to be port site value. But the existence of water is sufficient—it need not have the power which is needed for a dam site.

The *Twin City* and *Vepco* cases both involved lands which *could* be used for dams if all the land were assembled, if a federal license were granted, *if* many contingencies were satisfied. (It may be noted that at least some of the earlier cases, between *Chandler-Dunbar* and *Twin City*, denied compensation with language that talked of conjectural value because of the improbability that the use could be realized. See, *e.g.*, *United States ex rel. TVA v. Powelson*, 319 U.S. 266 [1943]; *Olson v. United States*, 292 U.S. 246 [1934].) But the lands here had present utility as a port site, at the time of taking. They have been used as a port site in the past, known as Castle Rock. Barge shipping has unloaded in past years on Appellants' lands.

The extent of federal power over power dam site developments is not the same as the power over port site development. Under the Federal Power Act, 16 U.S.C. §§ 791a-825r (1958), licenses are granted for a limited term, under specified conditions, with controlled rates, with preferences to states and municipalities, and may be denied altogether if the Federal Power Commission finds that the United States itself should construct the facility for which a private applicant has sought a license. See 16 U.S.C. §§ 799, 803, 812-13, 800 (a), 800 (b) (1958). The general tenor of the Act is to provide the rules for disposition and use of natural resources which the United States manages in an at least quasi-

proprietary capacity. The Supreme Court has said that the judgment of the Federal Power Commission can be upset only when that judgment has no basis in evidence and is devoid of reason. *United States* ex rel. *Chapman v. FPC*, 345 U.S. 153 (1953).

But the range of federal objection is restricted when the question is control of a private proposal to create a port. The object of control is to prevent obstruction to navigation. See 33 U.S.C. § 403 (1958). When harbor lines have been established by the Secretary of the Army under 33 U.S.C. § 404 (1958), section 403 permits a private person to build his wharves, docks, landings et cetera behind the harbor line. Only when there has been no harbor line established does section 403 require advance application to the Secretary of the Army for permission to build port facilities. This utilization by a property owner is a *right* subject only to the interests of navigation, accomplished by section 403. *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926).

At issue in *River Rouge* was the valuation of lands taken for a navigation improvement, as reduced by the extent to which the value of the remaining property was increased by the improvement. The Court held that the charge to the jury was:

permeated by the fundamental error, emphasized

by the refusal of the requests, that the jury were left to determine the amount of the benefits to be deducted on the theory that a riparian owner on the improved river would have merely such uncertain and contingent "privileges" of access to the navigable stream and of constructing docks fronting on the harbor line, as the Government, in the exercise of an absolute control over the navigation of the river, might see fit to allow him, instead of being instructed that he would have a right to such access and the construction and maintenance of such docks until taken away by the Government in the due exercise of its power of control over navigation. And this error was the more serious since the plan of the improvement contemplated that the improved river should become a slip for docks and industries and recognized the right of a riparian owner to construct docks upon the harbor line; and there was nothing in the evidence indicating any probability that the Government would at any time abrogate or curtail this right in any respect.

* * * The charge was not merely an overemphasis of the contingent character of the rights of the riparian owners, but in substance an instruction that they had no rights in this respect, and could only obtain uncertain privileges, as a matter of grace. There is an essential difference between a substantial property right which may be enjoyed until taken away in the appropriate exercise of a paramount authority, and an uncertain and contingent privilege which may not be allowed at all.

269 U.S. at 420-21.

The Court said the United States had requested a charge (the refusal of which was error) that:

> the jury be instructed, as bearing upon the existence and amount of the special benefits, that a riparian owner bordering on the new stream would have in respect thereto the usual rights of navigation pertinent to riparian property, that is, the right of access to the navigable part of the river in front of his property and the right to make a landing, dock or pier upon his harbor line, subject only to such general rules and regulations as the Government, in its power over navigation, might properly impose for the protection of the public right of navigation; that this power of the Government "over navigation for the protection of public rights can not be arbitrarily and capriciously exercised so as to destroy these riparian rights, but must be exercised with reasonable relations to the requirements of navigation . . . ."

269 U.S. at 417-18.

Thus the Government does not have the same power to restrict port site development that it has to limit the building of dams. To state it in terms of congressional intent, the statutes prohibit private dam development for a number of different reasons, including a finding that the Government itself should develop the dam. Port site development is barred only when it would constitute an obstruction to navigation.

The Supreme Court has compared the power of the Government over navigation to the power of state governments over the use of highways. "The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by

public authority . . . but in such cases no private right is infringed." *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932). The footnote (n. 3 at 319) compares the cases of *Gibson v. United States* and *Scranton v. Wheeler*, discussed at 14-15 of this brief and the raising of the level of the water, this reducing the power head at a private dam, was compared to the raising of a highway past a claimant's land—both noncompensable events. *United States v. Willow River Power Co.*, 324 U.S. 499, 510-11 (1945).

The application of a similar analogy here requires recovery of port site value although the Government could block access to the land or water highway, or could raise the level of the highway without compensation (other than for physical encroachment on the private lands). The taking of the property next to the highway without diminishing the value of the property requires compensation for the property according to its value as located next to the highway. Certainly the fact that the highway *could* be closed does not make the land worth only as much as land far from the highway. Rather the diminution in value if the highway were closed is discounted by the improbability of its happening to determine the value of the land. This approach is similar to the formula for valuing the easement held by Vepco, although the probability used there was that

of the exercise of the easement by the utility. 365 U.S. at 634-36.

There obviously is a point beyond which the Government may not use the navigational servitude to bar just compensation. One may imagine a condemnation of city industrial land in which it was contended that only the value of the land for residences, or even for stock grazing, need be paid because the city could zone the property to these restricted uses, and thus sever that portion of the present value which is attributable to industrial uses. Or similarly the federal government might seek to value irrigated land as desert land because the water could be cut off in the exercise of the navigation servitude. See Fairman, *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 133 (1956).

Almost bearing out Fairman's prediction, the Government contended that the practicability of irrigating lands could not be considered in a case involving other lands taken for this same John Day project. The court's oral order on the point allowed the irrigated value as the highest and best use to be shown, though the Judge tried to avoid the navigable servitude problem and relied in part on the different policy involved in western states' water, discussed at 36-37 of this brief. *United States v. Hess*, Civ. No. 63-289 (D. Ore. 1964) (Kilkenny J.), *appeal dismissed by stipulation*, No. 19763 (9th Cir. 1965).

See Appendix B of this Brief for the relevant portion of the transcript in that case, containing the judge's oral order at the pre-trial conference.

The examples seem absurd. They are absurd because such arbitrary action causing the diminution in value is highly improbable, and would be attended by sanctions, both judicial and political. Fairman, *supra.* The Government itself recognized this in its requested charge to the jury in *River Rouge*, quoted at 26 of this brief. The Government said that the navigation power cannot be "arbitrarily and capriciously exercised." The Supreme Court has interrelated the question of arbitrary action with property valuation in *United States* ex rel. *TVA v. Powelson*, 319 U.S. 266, 283-84 (1943. The question there presented was valuation of lands acquired for a private dam development, where all the necessary lands had not been acquired. To avoid the rule disallowing enhanced use value where the suggested use is highly unlikely, distant in the future, and involves assembling great quantities of land of which the particular condemnee only holds part, Powellson sought to set up the power of eminent domain held by him, to show acquisition of the needed lands was possible. The Court held the power to be a revocable privilege, for which the granting state need not pay if it revoked the license—and that therefore the federal government need not pay. The Court said:

> It is suggested that this result would mean that in condemnation proceedings the United States need not pay the value of the property at the time of the taking if the state where the property is located might destroy or diminish that value through an appropriate exercise of its police power. It is manifest that such is not the case. A state may of course destroy or diminish values by an assertion of its police power without the necessity of making compensation for the loss. [Citations omitted.] While such a change will not be presumed (*United States v. River Rouge Improvement Co.*, 269 U.S. 411 [1925], the possibility or probability of such action, so far as it affects present values, is a proper subject for consideration in valuing property for purposes of a condemnation award. [Citation omitted.] We do not disturb these general principles. The United States no more than a state can be excused from paying just compensation measured by the value of the property at the time of the taking merely because it could destroy that value by appropriate legislation or regulation. But we have here a unique situation. The power of eminent domain which respondent seeks to have reflected in the valuation is largely unexercised and need not be reflected in the measure of compensation if the state which conferred the privilege were the taker of the lands.

319 U.S. at 283-84.

So also should the land here be valued according to its highest and best use, as a port site, taking into consideration the possibility that legitimate government action will prevent port site development. The possibility here, of course, is about as slim as can be found: the Government disposed of the property by deed expressly

requiring a port to be developed on the tract which includes the lands here in question, and the State of Oregon's lease to the Boeing Company of the tract expressly gives the Boeing Company full riparian rights subject to various easements for minerals, utilities, grazing, et cetera. The possibility of destruction of port site value would thus appear to be virtually nil in the present case.

Persuasive additional reason for allowing port site value for the lands here in question comes from the general requirement that where part of a private parcel of land is condemned for any river or harbor improvement, the extent of benefit to the remaining portion of the parcel in private ownership from the improvement shall be taken to reduce the amount of compensation otherwise due for the lands taken. See 33 U.S.C. § 595 (1958). It was a provision to this effect which was at the heart of the *River Rouge Improvement Co.* case. The question there, and the position of the private party and the Government, were just the converse of the situation here. Land had been taken, there were benefits to the remaining land for improved utilization as a harbor, which was contemplated in the plans. The Government urged in language previously quoted in this brief that the benefits to the remaining land *for port purposes* were not speculative or uncertain, even in view of the navigational servitude.

The *River Rouge* Court recognized and cited *Chandler-Dunbar*. In navigational servitude cases, the Court has on occasion distinguished value in land as between private parties and value as between the government and a private owner. See, *e.g.*, *Grand River Dam Auth. v. Grand-Hydro*, 335 U.S. 359, 373 (1948); *United States v. Willow River Power Co.*, 324 U.S. 499, 511 (1945). But in *River Rouge* it was as between the Government and the private owner that the private land was held to have additional value because of its suitability for port development.

Is it not only the language of the *River Rouge* opinion which supports Appellant's position, but also the injustice of a contrary holding. It would be a strange result which would allow the Government on one side to take what the landowner would otherwise get by virtue of an improved value, and at the same time deny this identical value, for port purposes, when it takes the land itself. This heads I win, tails you lose approach by the Government does not square with the fifth amendment requirement of just compensation.

The essence of the government's contention is that the fact that lands are located by a navigable stream cannot be taken into account. Our position is illustrated, in part, by *United States v. 2,477.79 Acres of Land*, 259 F.2d 23 (5th Cir. 1958). There the Government took

three parcels of land, two for the purpose of a dam and reservoir and one for the purpose of barracks. The court held that the award for the two tracts taken for the flood control project had to be reduced by the enhanced value of the third tract because of its location on the new reservoir. Then the third tract was valued more highly than the other two when taken for barracks purposes because it had extra value by way of the location on the new reservoir. This case combines the aspects of *River Rouge* and those of the present case. It shows that the rule of *River Rouge* works both ways: that location next to water enhances the value of land, and this may be taken to reduce a condemnation award where the land is taken for the purpose of the project which enhances the value; that compensation must be paid according to the enhanced value of the land by virtue of its water-front location, even though the benefits of this location could (though not arbitrarily) be denied to the adjacent riparian owner. (The court understandably did not discuss the possibility that the benefits of the reservoir could be taken away, as by drainage or diversion, where the reservoir had just been built.)

The New York courts have considered the problem since *Twin City* (and, on appeal, since *Vepco*) and found that while flow value is to be excluded on condemnation, value by way of location next to water must

be paid. *Andrews v. State*, 19 Misc. 2d 217, 188 N.Y.S.2d 854 (Ct. Cl. 1959), *aff'd*, 11 App. Div. 2d 599, 200 N.Y.S.2d 451 (1960), *aff'd*, 9 N.Y.2d 606, 176 N.E.2d 42, 217 N.Y.S.2d 9, *cert. denied*, 368 U.S. 929 (1961). The Court of Claims said:

> It follows therefore that consideration must be given to the location of this land and its contiguity to the river in arriving at its fair market value. We cannot regard the decisions in *United States v. Twin City Power Co.* [citation omitted] and *United States v. Chandler-Dunbar Water Power Co.* [citation omitted] as requiring a different result. The effect of these cases is to hold that where property is condemned for use as an integral part of the flow of the stream, condemnee is not entitled to the value of the property when so used, since it is entirely within the power of the Federal Government to determine all factors governing the flow of the stream. Thus, one part of the decision in *United States v. Chandler-Dunbar Water Power Co.* dealing with the island owned by St. Mary's Power Co. rejected any value arising from location as a necessary part of a comprehensive system of river improvement. On the other hand, in the same decision, the Court approved the finding of additional value in the strip of land owned by Chandler-Dunbar Water Power Co. arising from its availability and suitability for lock and canal purposes. It seems quite clear that the canal and lock use can only be carried out in an exercise of the sovereign's control over commerce and navigation, and yet the paramount right of the sovereign over the flow of the stream for these purposes would not permit the appropriation of that property without compensation for that aspect of its value.

19 Misc. 2d at 22, 188 N.Y.S.2d at 860.

Admittedly this was a state condemnation, but federal principles were involved. The only dilution in effect of the quoted analysis is in the suggestion which followed that a contrary interpretation might not be in accord with New York law.

It is obvious that the jury can not be blinded to the fact that condemned land is next to water. And its being next to water affects the uses for which it is put. The use of land for a sewer system is obviously related to riparian use, and to location of the land next to water. Yet the sewer system which was flooded by navigable waters raised behind a dam was held to have value apart from flow of the water, and not based solely on riparian use. *Borough of Ford City v. United States*, 213 F. Supp. 248 (W.D. Pa. 1963). It is obvious that location must have been a factor. A closed loop system running from nowhere to nowhere, without an outlet for discharge of effluent, would have no value at all. So if there is to be a system, and discharge, it must be into water, which requires some location next to water.

It should be re-emphasized at this point that the suitability of Appellant's lands for a port site is historically established—this is the site of the old Castle Rock landing. And the lands were well suited for a port site before John Day Dam was ever conceived. Further since the

entire parcel of Appellant's lands was taken, there is no question in the case of improvements to a privately held residue. This point only simplifies the case, and does not detract from the applicability of *River Rouge*, nor diminish the injustice of the government's position.

As the Court said in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 337-38 (1893):

> [A]fter taking this property, the Government will have the right to exact the same toll the Navigation Company has been receiving. It would seem strange that, if by asserting its right to take the property, the Government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately posses and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice.

B. Assuming power to deny compensation, policy is found in Acts of Congress which indicates that full compensation is to be paid.

There is reason in the present case to find congressional intent to allow full compensation here, as there was in *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950). There were two bases for the Court's decision there: the exercise of congressional power did not seem to have been premised on an intent to aid

navigation, and intent was found to procede under the Reclamation Act which had provided compensation for interests taken or disturbed without regard to whether the navigational servitude could be exercised to defeat compensation.

While there is no doubt that the purposes of the John Day Dam include aid to navigation, Congress has chosen to exert less than its full power in aid of navigation in projects in the western states, including Oregon. In its Declaration of Policy, 33 U.S.C. § 701-1 (b) (1958), the navigation power is stated to be limited in favor of uses of navigable waters for several other purposes, including industrial use. The reason behind this policy is doubtless the arid condition of much of the area to which it applies, west of the 98th parallel. The provision shows that at least in this regard, Congress has limited the use of the navigation servitude in the western states.

This difference in policy in the West is reinforced by part of the Submerged Lands Act, 43 U.S.C. § 1311 (e) (1958):

> (e) Nothing in this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall

continue to be in accordance with the laws of such States.

The Submerged Lands Act is applicable to the navigable portion of the Columbia River which is involved in the present case. 43 U.S.C. § 1301 (a) (1958).

The general declaration of ownership in sub-section 1311 (a) independently lends weight to the Appellants' claim of port site value:

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States of the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or sucessors in interest thereof;

Congress had in mind the navigation power when the Submerged Lands Act was written; sub-section (a) is qualified by an exception for navigation in sub-section (d):

> (d) Nothing in this chapter shall affect the use,

development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

This exception is re-stated in the positive in section 1314 (a), but this sub-section also contains additional reason for full compensation in the present case:

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, *but shall not be deemed to include, proprietary rights of ownership,* or the rights of management, administration, leasing, *use, and development of the lands* and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title. [Emphasis supplied.]

The purpose of the act, as is well known, was to allow the states to make leases for mineral (primarily oil) exploration on the continental shelf under the sea. It is to this end in particular that section 1311 (a), above

quoted, confirmed title not only in the lands, but in the natural resources. And section 1301 (e) defines:

> (e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life *but does not include water power or the use of water for the production of power.* [Emphasis supplied.]

Thus Congress has specifically treated the particular claims involved in both the *Twin City* and the *Vepco* cases, in a fashion which comands application of the maxim *expressio unius est exclusio alterius.* All natural resources — all available uses of the land — except for water power for the production of power belong to the riparian owner who is the grantee of the state. The act confirmed the right in the state's grantee to have the proprietary rights of development of the lands and natural resources. This is subject to the navigation power: a power which can not be arbitrarily and capriciously exercised so as to destroy riparian rights, but must be exercised with reasonable relation to the requirements of navigation. *United States v. River Rouge Improvement Co.*, 269 U.S. at 418.

We recognize that at this point in our analysis of the effect of the Submerged Lands Act that the essential question of the degree to which the navigational servi-

tude affects compensation must involve the same test of constitutional navigation power with which we dealt earlier in this brief. But the quoted portions of the Submerged Lands Act add force to Appellants' claim that there is a property right in the riparian owner's right to *develop* his lands for the economically and socially useful value as a port — a right which can be limited only when the attempted exercise of it tends to obstruct navigation (as for example a dock which extends past the harbor line) or when the power over navigation is otherwise properly exercised in a fashion which consequentially limits use of the property, and subject to the limit that the owner does not have the *right* to develop a power project.

In the present case there was no such limit on the riparian owner's rights in his lands. The question, as we earlier stated, is not whether the government conceivably *could* have made Appellants' lands less valuable without becoming constitutionally liable for compensation. It is established that no such action was ever taken. Rather we have an admitted taking of the lands and of the rights which attach to and inhere in the land to make use of the lands for a port, as the lands had been used in the past, in the Castle Rock Landing. The lands taken and the riparian right to use them for a port were then incorporated in a larger tract which was transferred to the State of Oregon for use as a port — a tract

which Oregon had already leased, in anticipation o acquisition, to the Boeing Company, a private corpora tion.

In conclusion,

> The question presented is not whether the Unite States had the power to condemn and appropriat this property . . . for that is conceded, but hov much it must pay as compensation therefore. Obv ously, this question, as all others which run alon the line of the extent of the protection the individua has under the Constitution against the demands o the government, is of importance; for in any societ the fullness and sufficiency of the securities whic surround the individual in the use and enjoymen of his property constitute one of the most certain tes of the character and value of the government. Th first ten amendments to the Constitution, adopte as they were soon after the adoption of the Constitu tion, are in the nature of a bill of rights, and wer adopted in order to quiet the apprehension of many that without some such declaration of rights th government would assume, and might be held t possess, the power to trespass upon those rights o persons and property which by the Declaration o Independence were affirmed to be unalienabl rights.
>
> * * *
>
> It in no wise detracts from the power of the publi to take whatever may be necessary for its uses while, on the other hand, it prevents the publi from loading upon one individual more than his jus share of the burdens of government, and says tha when he surrenders to the public something mor and different from that which is exacted from othe members of the public, a full and just equivalen shall be returned to him.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 324-25 (1893).

II. Rule 71A of the Federal Rules of Civil Procedure does not stand alone to prescribe procedure for condemnation cases; the other Rules also apply, in particular, the Rules allowing extensions of time for excusable neglect.

Fed. R. Civ. Proc. 71A (a) specifically provides that the other Rules are applicable to condemnation proceedings except where Rule 71A otherwise provides. The only implication that this provision doesn't apply to the answer of the defendant is in Rule 71A (e) where it says the answer "shall" be filed within 20 days. On the other hand Rule 6 (b) allows enlargement of time after expiration of a specified period on a showing of excusable neglect. Rule 6(b) expressly excludes from its effect the Rules respecting Substitution of Parties, Motions for Directed Verdict, Amendment of Findings by the Court, Motions for New Trials of Amendment of Judgment, Relief from Mistake in Judgment, and Appeals to Circuit Courts. Fed. R. Civ. Proc. 25, 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), as detailed in Rule 6 (b). The obvious implication from this rather detailed list of situations in which the 6 (b) enlargement of time is not applicable is that 6 (b) does apply to proceedings under Rule 71A. The effect of the mandatory *shall* in 71A (e) must be taken to be no more than,

for example, the mandatory *shall* in Rule 12, providing in general for service of pleadings. And Rule 6(b) applies to ameliorate the word *shall* in Rule 12 (a).

It is unclear whether relief should be had in the present case under Rule 6 (b), or Rule 60 (b). The time from which the 20 day period of Rule 71A (e) runs is computed from the time of service of notice on the condemnee. This obviously is after the Declaration of Taking. In the present case the Declaration was made August 13, 1963, and the Judgment on the Declaration was made August 14, before the expiration of the time within which the condemnees could contest the validity of the taking. (R. at 22, 23.)

Rule 60 (b) allows relief from a final judgment order or proceeding on the ground of excusable neglect the same ground specified in 6 (b). 60 (b) specifies no exclusions from its effect in the fashion of Rule 6 (b) Thus whichever rule is applicable in the present case the ground is the same, excusable neglect, and the same problem of integration with Rule 71A is presented.

In addition to the fact that neither Rule 6 (b) nor Rule 60 (b) contains any provision which indicates an intent that Rule 71A not be affected, Rule 71A contains its own provisions expressly excluding certain other of the Rules. Subsection (d) (3) (i) makes Rule 4 (f) inapplicable, and subsection *(l)* makes Rule 54 (d) inap-

plicable. Here there is an additional implication that these are the only exclusions, except perhaps where there may be direct conflict. But we have shown that there is no conflict between the general provisions allowing relief from excusable neglect and the provision for service of answer in Rule 71A.

In at least three instances, various District Courts have relaxed the severity of that portion of Rule 71A which requires defendants to serve an answer "within 20 days."

In City of Davenport v. Three-Fifths of an Acre of Land, 147 F. Supp. 794 (S.D. Ill. 1957), *aff'd*, 252 F.2d 354 (7th Cir. 1958), the court held that where defendants had erroneously filed a motion to dismiss instead of an answer that the motion to dismiss would be treated as an answer. The court said, in part:

> It is quite possible that the defendant, not having answered within 20 days, has waived any objections or defenses to the taking of its property. However, the courts should and do construe the rules of civil procedure so as to work substantial justice in all cases and avoid a strict technical interpretation which might work a hardship on the litigants.

In *United States v. 1,108 Acres of Land*, 25 F.R.D. 305 (E.D.N.Y. 1960), the court held squarely that the provisions of Rule 60(b) were applicable to condemna-

tion proceedings brought under Rule 71A. However, in that particular case, the court also held that the defendants had failed to show the "excusable neglect" which would have brought them under the protection of Rule 60(b) and permitted a late filing.

In *United States v. 140.80 Acres of Land*, 32 F.R.D. 11, 14 (E.D. La. 1963), the Court, per Judge Ainsworth, likewise held that Rule 60(b) was applicable to proceedings brought under 71A although in that case there was also a failure on the part of defendants to demonstrate "excusable neglect."

Appellants have been able to find only one case in which a federal court has ruled that 71A proceedings must stand alone and that the court has no authority to relieve for excusable neglect. That case is *United States v. 7.724 Acres of Land*, 31 F.R.D. 290 (E.D. La. 1962) in which the court simply stated that Rule 6(b) is not applicable to 71A proceedings, citing no authority. Both the latter cases arose in the Eastern District of Louisiana; the latest case in point of time sustains the contention that the court has the authority to relieve the Appellants from excusable neglect.

Admittedly, excusable neglect has generally not been found when application has been made for relief. But this in no way detracts from the force of our argument here. We in this point seek simply to be allowed to

make a showing of excusable neglect; the District Court ruled it could not even be considered.

The answer which the defendants, Appellants here, would have filed, would have contested the validity of the taking by the federal government. In the first instance, the taking did not strictly comply with the requirement of 40 U.S.C. § 258a (1958) that a declaration of taking be filed "declaring that said lands are thereby taken for the use of the United States." While the Declaration of Taking did recite "The public use for which said property is taken . . ." (R. at 2) this failed to meet the statutory requirement. In particular, it must be noted that a "public use" is *not* the same as the use of the United States. Public use may be accomplished by any of the thousands of branches of government, most of them not part of the federal government, and even by some quasi-public bodies. Use of the United States is a different, more restrictive proposition, and, under the authority used, only lands for the use of the United States may be taken.

This taking, of course, is colored by the fact that while the Government is going to flow Appellant's lands with John Day Dam waters, the whole fee was taken, and the whole fee was immediately conveyed along with other properties to the State of Oregon. The State of Oregon had already, before acquiring the prop-

erty, leased it for a term of 75 years to a private, profit making company, the Boeing Company. Additionally, disposal of the lands for port use under 33 U.S.C. §578(b) (Supp. V 1964) is required to be at fair market value. This land which the Government sold for $17,500 was already under lease, subject to acquisition, for $60,000 per year. And that lease called not only for the port use contemplated in the disposal statute, 33 U.S.C. §578(a) (Supp. V 1964), but also general industrial use including private missile tests.

This type of government action is subject to review by the courts. *United States v. Agee*, 322 F.2d 139 (6th Cir. 1963). The recitals of the two preceding paragraphs of this Brief are not matters presented for review in this present appeal. Rather they are there presented to demonstrate the good faith of Appellants in seeking to be allowed to make an Answer to the condemnation proceeding, and to show that there are matters which should be properly presented in due course for the consideration of the courts.

The question of excusable neglect is one on which the District Court should have ruled. The case should be returned to the District Court to allow consideration of the merits of the excusable neglect urged by the Appellants. Rule 71A by its own terms provides that the

other rules are applicable, and this must be taken to include those rules providing for extensions of time.

CONCLUSION

It is patent from the specific exclusions in the Rules of Civil Procedure, that the District Court was wrong in concluding that the provisions for extensions of time for excusable neglect were inapplicable to condemnation proceedings. The District Court should have ruled on the merits of the neglect which occurred, on the proper motion of the Appellants seeking to be allowed to file an Answer to the condemnation proceeding.

The District Court should have allowed Appellants to show, in accordance with the general law, the highest and best use of their lands, as a port site. This use, not speculative since the lands had been used as a port in the past, is subject to the navigation servitude to the extent that the Government properly acts within the bed of the stream in aid of navigation. But here nothing was done by the Government to diminish the value of this land. Rather the lands were taken for use as a port site, and port site value should be allowed the owners. The Supreme Court has held that as between the Government and the private owner, the riparian right to develop a port is a valuable property right. For this, constitutional just compensation must be paid. This conclusion is reinforced by the grant in the Submerged Lands

Act of the right to develop all natural resources except-ing only power site development, and subject only to the navigation servitude. Here there was a taking of the lands at their full value. Full compensation must be allowed.

Wherefore Appellants respectfully pray that the judgments of the United States District Court for the District of Oregon be reversed, and the case remanded for a hearing on whether Appellants should be allowed to file an Answer, and for a new trial on the issue of just compensation, allowing evidence of port site value.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ LLOYD B. ERICSSON

APPENDIX A

Lease between the State of Oregon and The Boeing Co., of record in Morrow County, Oregon, Deed Book 70, pp. 241-74.

Appendices to this lease are omitted from this Appendix.

LEASE

This Lease made as of the 2nd day of July, 1963, by and between the State of Oregon, acting by and through the State Land Board, Lessor ("the State"), and The Boeing Company, a Delaware corporation, Lessee ("the Company"), witnesseth that:

RECITALS

A. Part of the lands described in Schedule A hereto ("the premises") now are owned by the State; part of the premises now are owned by the United States of America acting by and through the Department of the Navy ("Navy"); part of the premises now are owned by the United States of America acting by and through the Department of Interior ("Interior") and the Corps of Engineers ("the Corps").

B. Navy is empowered by Section 207 of Public Law 86-500, 74 Stat. 166, 175, The Reserve Forces Facilities Act of 1960, as amended by Public Law 87-356, 75 Stat.

777, to convey to the State Navy lands within the premises ("Navy lands") in exchange for the State's conveyance to Navy of other lands and facilities suitable for Navy purposes. A complete substitute facility has been provided and is available for use by Navy.

C. The Corps has authority and has taken steps to acquire the Interior lands within the premises and is empowered by Section 108 of Public Law 86-645, 74 Stat. 480, to convey to the State the Corps and Interior lands within the premises ("Corps lands") subject to a standard flowage easement and subject to reversion to the Corps in the event of non-use or substantial departure from an approved plan of development.

D. The State has been granted legislative authority to marshal and acquire Navy and Corps lands and has taken preliminary steps to acquire these lands.

E. Pending acquisition of the Navy and Corps lands, the State has obtained permission from Navy, Interior, and the Corps for the State and its lessees to go upon the Navy and Corps lands.

F. Upon acquiring the premises, and pursuant to legislative authority, the State proposes to lease the premises to the Company and the Company desires to rent the premises from the State upon the terms and conditions set forth hereinafter.

CONDITIONS, COVENANTS AND AGREEMENTS

Now, therefore, in consideration of the premises and of the mutual covenants and agreements expressed hereinafter and for other good and valuable considerations, the parties hereto agree as follows:

ARTICLE I.

CONDITIONS TO BE PERFORMED BY THE STATE PRIOR TO COMMENCEMENT OF THE COMPANY'S OBLIGATION TO PAY RENT

1. *First Condition.* Upon execution of this lease, the State, without expense to the Company, shall use its best efforts and shall do all things necessary promptly to acquire title to the premises subject only to the terms, conditions, reservations, exceptions and limitations set forth in Schedule B attached hereto and by this reference made a part hereof and, immediately upon so acquiring title thereto, shall cause to be delivered to the Company the following: (i) the unqualified written opinion of legal counsel selected by the Company that the State is authorized and empowered to enter into and to execute this lease and that this lease, when duly executed by the parties hereto and delivered, is and shall be the binding legal obligation of the State as lessor, in accordance with its terms; and (ii) the standard form of preliminary title insurance report and com-

mitment, issued by a title insurer acceptable to the Company, which shall commit said title insurer to issue to the Company its standard form of policy of title insurance containing only those terms, conditions, reservations, exceptions and limitations as are described in Schedule B hereto and insuring the Company's leasehold interest in the premises in the amount of $100,000.00 upon the filing of this lease for record and payment by the Company of the premium therefor.

2. *Second Condition.* Within ten (10) days of its receipt of both of the documents aforementioned in paragraph 1 of this Article I, the Company shall notify the State in writing either that the State's title conforms to the stipulations of Schedule B or that the State's title is deficient because it does not conform to the stipulations of Schedule B. In the latter event, the Company's notice shall specify in what particular the State's title does not conform to the stipulations of Schedule B and the State shall have ninety (90) days from the date of its receipt of the Company's notice in which to correct the title defect specified in the Company's notice. If the defect specified in the Company's notice shall not have been corrected within the said ninety (90) days, this lease shall expire at the close of business in Seattle, Washington on the ninetieth (90th) day without further notice or action by either party hereto, unless the Company shall earlier have notified the State in writing

that it waives any defects remaining unremedied. When the defect shall have been corrected within the said ninety (90) days, the State shall cause to be delivered to the Company prior to the close of business in Seattle, Washington on the ninetieth (90th) day a supplementary preliminary title insurance report and commitment which shall conform to the stipulations of Schedule B, and thereafter, the procedures set forth in this Article I shall be followed with respect thereto as if it were the first preliminary title insurance report and commitment.

3. *The Company's Election if the State Should Fail to Perform First Condition.* If for any reason the Company should not have received both of the documents aforementioned in paragraph 1 of this Article I prior to noon, P.D.T. September 30, 1963, the Company shall have an election, exercisable by mailing written notice thereof to the State postmarked prior to midnight, October 15, 1963, either to terminate this lease forthwith or to waive the first condition. If the lease shall be so terminated, neither party hereto shall have any obligation whatsoever to the other party hereto under this instrument except that all sur-rental payments previously made pursuant to paragraph 2(a) of Article III hereof shall be returned to the Company pursuant to the escrow instructions set forth in Schedule D attached hereto, and the Company thereupon shall surrender

possession of the premises. If the Company should waiv the first condition, it shall fix a date in 1963 by whicl the State shall perform it and, in the event of the State' subsequent or continued failure to perform the condi tion by the 1963 date so fixed, this lease shall expire a the close of business on the 1963 date so fixed withou further notice or action by either party hereto and th State thereupon shall refund to the Company all sur rental payments previously made pursuant to subpara graph 2(a) of Article III hereof and the Company thereupon shall surrender possession of the premises.

4. *Possession.* The Company shall be entitled to pos session of the premises at the following times and on th following terms and conditions:

(a) Immediately upon execution of this lease the Company shall pay the amount of sur-renta provided for in subparagraph 2(a) of Article II hereof and on and after July 2, 1963 shall have a license to enter the premises for survey and explora tion purposes, including Navy, Interior and Corps lands, but subject, as to the latter, to the further conditions set forth in the Navy, Interior and Corps permits to enter, attached hereto as Schedule C.

(b) Within ten (10) days after receiving both of the documents aforementioned in paragraph 1 of this Article I, the Company shall pay to the State the

amount provided for in paragraph 3 of Article III hereof and thereupon shall be entitled to possession of the premises upon the terms and conditions set forth herein without regard to any limitations or conditions set forth in Schedule C.

ARTICLE II.

LEASE, TERM, EXPIRATION AND TERMINATION

1. *Lease.* Subject to the foregoing conditions, the State hereby leases to the Company and the Company hereby leases from the State the lands particularly described in Schedule A, subject only to the encumbrances, reservations, use restrictions and exceptions described in Schedule B, for the term and upon the terms and conditions set forth hereinafter.

2. *Term.* The term of this lease shall commence on the day on which, pursuant to subparagraph 4(b) of Article I of this lease, the State puts the Company in possession of the premises and, subject to earlier termination as provided for hereinafter, the said term shall expire at 11:59 P.M., December 31, 2040, A.M.

3. *Termination by the State.* The State, having cause or by reason of the Company's default remaining unremedied as provided hereinafter, may cause this lease to be terminated under the following circumstances and upon and subject to the following terms and conditions:

(a) *Failure to Put Premises to Proper Use.* If, a any time prior to December 31, 1970, the Company's use of the premises for industrial or for industria research or developmental purposes shall have me the standard prescribed in paragraph 1 of Article IV hereof ("use test"), the State may not terminate thi lease for the cause which is the subject of this sub paragraph 3(a) of Article II and this subparagraph shall be of no force or effect whatsoever. If, as o December 31, 1970, the Company's use of the prem ises for industrial or for industrial research or de velopmental purposes in fact shall have failed t meet the use test, the State may take the following action leading to the termination of this lease on December 31, 1971. First, the State shall notify the Company not later than January 10, 1971, that in the State's judgment the Company's use of the prem ises fails to meet the use test. If said notice is not given on time, the State shall be deemed to have acknowledged that the Company's use of the prem ises conforms to the use test and to have waived irrevocably and to have abandoned permanently the State's right to terminate for this cause. After receipt of such notice, if, in fact the Company shall have failed to meet the use test, the Company shall have until June 30, 1971, in which to meet the use test and, if it shall have done so on or before the

latter date, the State's earlier notice shall have no force or effect and the term of this lease shall never again be subject to termination for this cause. If, on June 30, 1971, the Company's use of the premises still does not meet the use test, the State may notify the Company not later than July 10, 1971, that, pursuant to this lease provision, the lease shall be terminated by the State as of December 31, 1971, and if such notice is timely given, and if, in fact the Company shall have failed to meet the use test, this lease shall so terminate. If said notice is not given on time, the State shall be deemed to have acknowledged that the Company's use of the premises conforms to the use test and to have waived irrevocably and to have abandoned permanently the State's right to terminate for this cause.

(b) *Termination for Non-User.* If, after December 31, 1971, the premises are not used for any of the purposes specified in the use test for a period of twelve (12) consecutive calendar months, the State may take the following action which may lead to the State's unilateral termination of this lease. Within thirty (30) days of the last day of the twelfth (12th) consecutive month of non-user, the State may notify the Company: (i) of the fact of the Company's non-user for twelve (12) consecutive calendar months; (ii) of the terminal date of the period of non-user;

and (iii) that unless the premises are put to any of the uses specified in the use test within six (6) calendar months from the aforementioned terminal date, the State shall terminate this lease pursuant to this provision on the last day of the sixth (6th) month. If the premises are so used within the time prescribed in said notice, the notice shall be of no force and effect and this lease shall not so terminate. If the premises are not so used within the time prescribed in said notice, this lease shall so terminate.

(c) *Default and Re-Entry — Termination for Cause.* The foregoing subsections 3(a) and (3)b do provide and shall be deemed to provide the exclusive means of termination by the State in the circumstances described therein. The provisions of this subparagraph 3(c) shall not be applicable to the circumstances described in subparagraphs 3(a) and 3(b) even though the 3(a) and 3(b) circumstances may involve a lease violation or default by the Company. If, within thirty (30) days after receiving notice of its violation of or its default in the performance of any covenant of this lease, the Company should fail or neglect to take steps to correct any such violation or default which in fact exists, then the State may terminate this lease by re-entering the premises at the expiration of the thirty (30) day period. In the event that the State should re-enter

under the foregoing provision of this lease, the Company's liability for rent to become due thereafter shall be extinguished.

4. *Termination by the Company*. The Company may terminate this lease under the following circumstances and upon and subject to the following terms and conditions:

(a) *For Breach of the State's Covenant of Quiet Enjoyment*. The State covenants that so long as the Company performs the covenants by it to be performed hereunder the Company shall have quiet and peaceful possession, use and enjoyment of the premises. If the Company's quiet and peaceful possession, use and enjoyment of the premises should be breached in any manner or degree, the Company may give the State written notice thereof and, if the State should fail, neglect or be unable to terminate and correct the breach of the Company's quiet enjoyment within ninety (90) days of its receipt of said notice, the Company may cause termination of this lease by giving the State written notice of termination and, in the latter event, termination shall occur without further action by either party at the close of business on the one hundred eightieth (180th) day following the giving of said termination notice. This remedy shall be in addition to any and all

other remedies which the Company may enjoy either at law or in equity. Except as otherwise provided herein, exercise by any party entitled to the benefit thereof of any of the reservations or exceptions set forth in Schedule B shall not constitute breach by the State of the foregoing covenant of quiet and peaceful possession, use and enjoyment of the premises.

(b) *Condemnation*. If any eminent domain proceedings are instituted under which all or any portion of the premises may be taken by exercise of the power of eminent domain, and if, in the Company's absolute and uncontrolled judgment and discretion, the threatened taking will materially interfere with, hinder, embarrass or inconvenience the Company's use or intended use of the premises, the Company may terminate this lease by giving the State appropriate written notice on or before the one hundred twentieth (120th) day following the institution of such eminent domain proceedings. Termination shall occur either on the date that lawful possession is taken by the condemnor or one hundred eighty (180) days following the giving of the notice of termination, whichever is the later date.

(c) *The Company's Right to Terminate Without Cause*. In addition to the termination rights the Com-

pany may exercise pursuant to Article I hereof and pursuant to the subparagraphs of this paragraph 4 of this Article II, the Company, without cause or default by the State, unilaterally may cause this lease to be terminated as at 11:59 P.M., December 31, in the years 1970, 1980, 1990, 2000, 2010, 2020, or 2030, A.D. The Company's right so to terminate shall be exercisable by giving the State written notice of the Company's election to terminate not later than January 1 of the same year in which such termination is to become effective.

5. *Removal of Property on Expiration and Termination.* At any time during the term of this lease or upon its expiration or in the event of any termination or of any re-entry, the Company shall have the right but not the obligation to dismantle all of its fixtures and properties, real, personal and mixed that may be located in or upon the premises and to remove them therefrom. In any situation in which termination or re-entry shall have occurred less than one hundred eighty (180) days from the date on which the Company was notified of the impending termination, the Company shall have not less than one hundred eighty (180) days after receipt of such notice or of such a re-entry in which to complete its dismantling and removal operations.

6. *Surrender of Possession.* The Company shall sur-

render possession of the premises upon expiration c upon completion of dismantling and removing its pro erties in the event of a prior termination or re-entry an shall leave the premises in as good condition as exist at the time of its taking possession thereof; expectabl changes attributable to the Company's use of the lan and changes caused by the elements and other cause beyond the Company's control being excepted from th foregoing covenant.

7. *Exercise of Reserved Mineral Rights.* The Stat shall at all times protect and defend the Company right to carry out its intended or desired use of th premises from any and all claims of parties claiming right to use of the premises or a portion thereof by rea son of reservation in them or their predecessors in titl or interest of oil, gas, or minerals or the right to explor for or to exploit such oil, gas, or minerals. In cases wher the State may be entitled or is bound to grant permi sion for such exploration or exploitation, such permi sion shall not be given by the State without the Com pany's prior written consent approving the terms, con ditions, time of beginning, duration and geographica extent of such permission. The State's failure to perfor any of its obligations under this paragraph 7 shall con stitute a breach of the covenant of quiet and peacefu possession, use and enjoyment of the premises pursuan to subparagraph 4(a) of this Article II.

8. *Grazing and Agricultural Rights and Leases.* Notwithstanding any other provisions of this lease or of Schedule B, the State hereby covenants and agrees as follows:

(a) The State shall defend and hold harmless the Company, its successors, assigns and sublessees and the officers, agents, employees, contractors, subcontractors, lessees, sublessees, licensees, permittees, successors and assigns of any of them from any and all claims for loss, cost or damages of any nature and from whatever source suffered or incurred by virtue of the exercise by any party or parties of their rights under any reservation of grazing or agricultural rights or any grazing or agricultural leases in effect at the time the Company is given possession of the premises pursuant to subparagraph 4(b) of Article II hereinabove.

(b) The State shall grant no grazing or agricultural rights, permits or leases or permit any extensions, renewals or modifications of existing grazing or agricultural rights, permits or leases without the prior written consent of the Company approving the terms, conditions, time of beginning, duration, and geographical extent thereof. In the event any such grazing or agricultural rights, permits or leases shall

be granted, all consideration therefor shall be paid to the Company.

(c) The State's failure to perform any of its obligations under this paragraph 8 shall constitute a breach of the covenant of quiet and peaceful possession, use and enjoyment of the premises pursuant to subparagraph 4(a) of this Article II.

ARTICLE III.

RENT

1. *Basic Rental.* Except as hereinafter provided in this Article III, the Company shall pay quarterly rental of Fifteen Thousand Dollars ($15,000.00) in advance not later than the fifteenth (15th) day of January, April, July and October of each year of the lease term. The payment provided for in subparagraph 2(a) of this Article III shall be made to the United States National Bank of Portland, Oregon, in escrow, pursuant to escrow instructions set forth in Schedule D attached hereto and by this reference made a part hereof. Initially, all other payments shall be made by mail to the order of the Oregon State Treasurer at his office in Salem, Oregon. At any time and from time to time the State may designate an alternate method of payment delivery or an alternate place of payment or both.

2. *Sub-Rental.* In addition to the basic rental pro-

vided by paragraph I of this Article III, the Company shall pay to the State a sur-rental equal to (i) the State's cost of removing Navy from the premises and providing a substitute facility for Navy's use, or (ii) Seventy-five Thousand Dollars ($75,000.00), whichever is smaller. The total sur-rental thus determined shall be payable as follows:

(a) *1963 Sur-Rental.* Upon execution of this lease, the Company shall pay in escrow, as provided in Schedule D attached hereto, a sur-rental payment of Thirty-five Thousand Dollars ($35,000.00).

(b) *Sur-Rental Payments for the Years 1964 Through 1969.* Commencing January, 1964, and continuing through October, 1969, the Company shall pay in advance, at the times and in the manner that basic rental is paid pursuant to paragraph 1 of this Article III, quarterly sur-rental equal to one-twentieth (1/20th) of the difference between the total sur-rental as determined by this paragraph 2 and the 1963 sur-rental payment provided for in subparagraph 2(a) of this Article III.

3. *Basic Rental for 1963.* If the Company is given possession of the premises in 1963 pursuant to subparagraph 4(b) of Article I hereinabove, the basic annual rental for 1963 of Sixty Thousand Dollars ($60,000.00) shall be prorated according to the number of days of

such possession. The latter amount, thus prorated, shall be the sum which the Company shall be required to pay pursuant to subparagraph 4(b) of Article I hereinabove.

4. *Basic Rental Adjustment.* The basic rental provided for in paragraph 1 of this Article III shall be and shall remain effective only until December 31, 1969. In order to cause the basic rental to conform to major trends in the changing purchasing price of the dollar, the dollar amount of the basic rental shall be adjusted in 1969 and every ten (10) years thereafter. The new basic rental, as thus adjusted ("adjusted basic rental"), shall become effective on January 1 of the years 1970, 1980, 1990, 2000, 2010, 2020 and 2030 A.D., respectively, ("adjustment dates"), and the adjusted basic rental becoming effective as of any adjustment date shall remain effective until the next following adjustment date or until expiration or earlier termination of this lease. The annual adjusted basic rental for any 10-year period shall be the amount which bears the same ratio to Sixty Thousand Dollars ($60,000.00) as: (i) The Wholesale Price Index (all commodities) published by the United States Labor Department's Bureau of Labor Statistics for the month of March in the year immediately preceding any adjustment date bears to (ii) the said same index for the calendar month in which the Company initially takes possession of the premises pursuant to subparagraph 4(b) of Article I

hereinabove. If said Wholesale Price Index is discontinued, the State and the Company shall select as nearly comparable statistics, reflecing the purchasing power of the dollar in the hands of a consumer purchasing commodities at wholesale, as then may be published in some responsible financial periodical of recognized authority or is then otherwise available, and such statistics shall be used thereafter in lieu of said Wholesale Price Index in determining the adjusted basic rental. If, prior to the next succeeding adjustment date, the parties hereto are unable to agree upon the statistics to be used in lieu of the discontinued Wholesale Price Index, selection of the substitute statistics shall be made by such third party as the parties hereto may agree upon, or in the absence of agreement, shall be made by such third party as may be chosen by the then presiding judge of the United States Court of Appeals for the Circuit encompassing the State of Oregon on application of either party upon notice to the other party.

5. *Rental on Additional Lands.* If at any time or from time to time in the future the State should acquire by purchase, lease, federal surplus procedures, or otherwise, any federal lands, or, for industrial purposes, any other lands contiguous to the premises covered by this lease, which at the time of their acquisition by the State are not within the premises then being leased to the Company, the State shall give the Company written

notice of its acquisition of said additional lands. For sixty (60) days after its receipt of said written notice, the Company shall have the right to cause all or any part of the additional lands, so acquired by the State, to be made subject to this lease. The basic rental per acre per quarter on any such additional land after it becomes subject to this lease shall be the basic rental per acre per quarter paid on the land subject to the lease on the first day of the quarter immediately preceding that quarter in which the additional land becomes subject to this lease.

6. *Sub-Rentals.* The Company shall pay to the State on or before the 15th day of January of each calendar year, an amount to 50% of the Company's gross cash receipts as sub-rental during the immediately preceding calendar year with respect to any portion of the premises which the Company has sub-let pursuant to paragraph 2 of Article IV hereof; provided, however, that the State shall not be entitled to any sub-rental payments hereunder until the Company shall first have recovered from sub-rentals an amount equal to the total sur-rental payment pursuant to paragraph 2 of this Article III; and provided, further, that the State shall not be entitled to any sub-rental payments in any calendar year until the Company shall have first recovered from sub-rentals, an amount equal to the annual adjusted basic rental for that year. In determining the amount

of the Company's gross cash receipts as sub-rental, there shall be considered only such amounts as are actually received by the Company as cash payments for sub-rental attributed to the bare land, excluding all improvements, over which the sub-tenant has been given exclusive possession and control.

ARTICLE IV.

POSSESSORY USE, RIGHTS AND OBLIGATIONS

1. *Use Test.* Subject to the following terms, conditions and qualifications the Company shall make use of the premises primarily for industrial or industrial research or developmental purposes. Failure to do so shall subject the Company to the risk of the State's termination of this lease pursuant to the provisions of paragraph 3(a) of Article II hereof; provided, however, that the Company's use of the premises shall be and shall be deemed to be primarily for industrial or industrial research and developmental purposes, and this lease shall not be subject to termination by the State pursuant to paragraph 3(a) of Article II hereof if:

(a) The Company's primary industrial or industrial research and developmental effort is concentrated in only a part or parts of the entire premises;

(b) While the Company's primary industrial or

industrial research or developmental effort is cor
centrated in a part or parts of the premises, anothe
part or other parts of the premises are put to nor
industrial use by (i) a party entitled to enjoy th
rights, reservations, use restrictions or exceptior
set forth in Schedule B hereto; or (ii) by the Com
pany; or (iii) by those in possession of the premise
by its consent. For example, if, while the Company
primary industrial or industrial research develop
mental effort is concentrated in one part or parts c
the premises, the Company, to minimize fire haz
ard or to accommodate neighboring grazing or agr
cultural interests, should permit sheep to graze an
agriculture to be practiced on another part or othe
parts of the premises, this lease shall not be subjec
to termination by the State pursuant to paragrap
3(a) of Article II hereof. Similarly, if, while th
Company concentrated its primary industrial or in
dustrial research or developmental effort in one par
or parts of the premises, the Company should deer
it desirable to construct housing or some related fa
cility for the accommodation of personnel involve
in the industrial or industrial research or develop
mental effort or in secondary efforts related thereto
the Company may permit the construction of such
housing or other facilities without being subject t

termination of this lease pursuant to paragraph 3(a) of Article II hereof.

2. *Subletting and Assignments.* This lease shall not be assignable by the Company and the Company shall not sublet more than one-half (½) of the premises without the State's prior written consent, which shall not be withheld unreasonably; provided, however, that without the State's consent, the Company may assign this lease to the United States or to any agency or instrumentality thereof and the Company may sublet up to and including one-half (½) of the premises. Transfer of this lease from the Company to another party by merger, consolidation or liquidation and change in the ownership of or power to vote the majority of the Company's outstanding voting stock shall not be deemed to constitute an assignment for the purposes of this paragraph. The granting of leases or other interests in the premises permitting grazing or agricultural uses of the premises or a portion thereof shall not constitute an assignment or a subletting for the purposes of this paragraph.

3. *Use by Subtenants.* Subtenants may use the premises for any lawful purpose, and industrial use or industrial research or developmental use by a subtenant shall be deemed to be the Company's use for the purposes of paragraph 3(a) of Article II and paragraph 1 of this Article IV hereof.

4. *Liens.* The Company shall keep the premises free from any liens arising out of work performed, materials furnished or obligations incurred by or for the Company.

5. *Taxes.* For all purposes of this lease the terms "tax" and "taxes" shall refer only to those taxes, excises, duties, fees, assessments and charges which lawfully are levied or an imposed by the State of Oregon or by any lawfully created municipal corporation, taxing district, improvement district, agency, institution, department or political subdivision of state or local government which becomes a lien upon the premises after the date on which the Company takes possession thereof and which becomes due and payable prior to the date on which, by virtue of expiration or prior termination of this lease, the Company surrenders possession thereof. The Company shall pay or shall cause to be paid when due all taxes, as thus defined, provided, however, that the Company may deduct from rental payments due to the State hereunder during any calendar year any and all taxes payable during such calendar year based upon, incident to or measured by either: (i) the bare land value of the premises; or (ii) the value of this leasehold interest as intangible personal property; or (iii) both (i) and (ii) above.

6. *Condemnation—Reduced Rental and Division of Award.* If the Company elects not to terminate pursuant

to subparagraph 4(b) of Article II hereof, the basic rental payable hereunder on and after the date lawful possession is taken by condemnor shall be reduced by the amount of rental which is proportionate to the area so taken. Any award made in eminent domain proceedings involving the premises shall be distributed as between the State and the Company as follows: (i) the State shall receive all sums, if any, awarded as compensation for the taking of the bare land exclusive of improvements thereon; and (ii) the Company shall receive all sums awarded as compensation for the taking of the Company's leasehold interest and for the taking of the Company's improvements, including, without limiting the generality of the foregoing, all site preparation, grading, subgrading and filling and buildings, installations, facilities, attachments, fixtures, additions and appurtenances.

7. *Navy Contract.* The State covenants that it will perform its obligations pursuant to its contract with Navy for the purchase of Navy lands within the premises and will not permit any impairment or forfeiture of its interest thereunder. Documentary evidence of satisfaction of each of such obligations shall be promptly supplied to the Company upon its request. Failure of the State to satisfy any such obligation or to supply such evidence shall be deemed to be a breach of the State's covenant of quiet and peaceful possession, use and en-

joyment of the premises pursuant to subparagraph 4(a) of Article II hereabove. Notwithstanding the foregoing the Company shall have the right, but not the obligation, to take whatever action may be required to remedy any default by the State in its obligations to the Navy pursuant to said contract, including but not limited to the payment of moneys owed by the State to Navy. The entire cost of any such action by the Company shall be offset against any rental or sur-rental payments then due or thereafter to become due to the State pursuant to Article III hereof.

8. *Waterfront Property*. The parties hereto recognize that the State's title to the waterfront property within the premises is subject to certain conditions and use restrictions as set forth in Schedule B. Notwithstanding this, the Company shall have unrestricted use of the waterfront property and full riparian rights in conjunction therewith, and the State shall exercise every effort to secure, preserve and protect such rights. The State's failure to perform its obligations pursuant to this paragraph 8, or any interference, of any nature and from whatever source, with the Company's intended or desired industrial use or development of the waterfront property, whether or not such intended or desired industrial use or development is consistent with an approved plan of development, shall constitute a breach of the State's covenant of quiet and peaceful possession,

use and enjoyment pursuant to subparagraph 4(a) of Article II hereinabove. The State's obligation with respect to waterfront property shall include but not be limited to the following:

(a) The State shall use every effort to secure approval by the Corps, or its successors in interest, of any proposed plan or amendment to existing plans for development or use of the waterfront property which may be requested by the Company.

(b) The State shall use evey effort to acquire and make application for any additional waterfront property contiguous with or adjacent to the premises which the Company may require or desire for use or development for industrial or port facilities in conjunction with the use of the premises by the Company or its subtenants.

(c) The State shall use every effort to acquire and make application for any and all additional waterfront property contiguous with or adjacent to the premises which are or may become available pursuant to Section 108 of Public Law 86-645, 74 Stat. 480, or any other or similar legislation presently in force or hereafter enacted.

ARTICLE V.

ADMINISTRATIVE PROVISIONS

1. *Notice.* Any notice required to be given by eithe party to the other pursuant to the terms of this leas shall be sufficiently given if made in writing and maile by registered or certified mail, postage prepaid, at an post office either in the State of Oregon or in the Stat of Washington and addressed to the Company at Pos Office Box 3707, Seattle 24, Washington, Attention Director of Facilities, and addressed to the Governor Salem, Oregon, or to such other address as either part at any time and from time to time unilaterally may des ignate in writing. Any notice required to be given here under shall be deemed to have been given on the nex regular business day following such mailing by regis tered or certified mail, postage prepaid.

IN WITNESS WHEREOF, the parties hereto hav caused this instrument to be executed and their respec tive seals to be affixed hereto by their duty authorize and empowered officers this 1st day of July, 1963.

THE STATE OF OREGON
By The State Land Board

(Seal)

By Mark Hatfield
Governor

By Howell Appling
Secretary of State

By Howard C. Belton
State Treasurer

THE BOEING COMPANY
(Seal) By William M. Allen

H. O. Cake

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 1st day of July, 1963, before me the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared William M. Allen, to me known to be the President of THE BOEING COMPANY, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he is authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and official seal hereto affixed the day and year in this certificate above written.

Harry L. Blangy Jr.
(Seal) Notary Public in and for the State of Washington, residing at Seattle.

Schedule "A"

The following described property in Morrow County, Oregon:

In Township 2 North, Range 23 East of the Willamette Meridian:

All of Sections 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 22, 23 and 24.

In Section 6:

The Southeast Quarter of the Northwest Quarter (SE-¼ NW-¼), the South Half of the Northeast Quarter (S-½ NE-¼), the Northeast Quarter of the Southeast Quarter (NE-¼ SE-¼), and Government Lots 1, 2, 3, 4 and 5.

In Section 8:

The Northeast Quarter (NE-¼), the North Half of the Northwest Quarter (N½ NW¼), and the East Half of the Southeast Quarter (E-½ SE-¼).

In Section 16:

All of that portion of said Section 16 which lies easterly of State Highway No. 74 as it is now situated, save and except the following described tract of land.

Starting from a point on the East Boundary line of the right of way of State Highway No. 74 as it is now situated 400 feet North and 400 feet East of the Southwest corner of said Section 16, thence due East 400 feet thence due North 600 feet, thence due West to the East boundary line of the right of way of State Highway No. 74, thence South along the East boundary line of the right of way of State Highway No. 74 to the place of begin-

ning; all of said tract being located in the Southwest Quarter of the Southwest Quarter (SW-¼ SW-¼) of said Section 16.

In Section 21:

All of that portion of said Section 21 which lies Easterly of State Highway No. 74 as it is now situated, save and except the following described tract of land:

Starting from a point on the East boundary line of the right of way of State Highway No. 74 as it is now situated 1200 feet South and 300 feet East of the Northwest corner of said Section 21, thence due East 500 feet, thence due South 500 feet, thence due West to the East boundary line of the right of way of State Highway No. 74, thence North along said East boundary line of State Highway No. 74, to the place of beginning; all of said tract being located in the West Half of the Northwest Quarter (W-½ NW-¼) of said Section 21.

In Township 3 North, Range 23 East of the Willamette Meridian:

All of Sections 1 through 36, inclusive.

In Township 4 North, Range 23 East of the Willamette Meridian:

All of fractional Sections 13, 14, 22 and 23 and the East Half (E-½) and the East Half of the West Half (E-½ W-½) of fractional Section 21, and all of Section 24, except the relocated rights of way for Oregon-Washington Railway and Navigation Company (Union Pacific Railroad) and for relocated United States Highway No. 30.

All of that portion of Section 20, 30 and the West Half of the West Half (W-½ W-½) of Section 21 lying Southerly of the right of way for relocated United States Highway No. 30.

All of fractional Section 15.

All of Sections 25, 26, 27, 28, 29, 31, 31, 33, 34 35 and 36.

In Township 2 North, Range 24 East of the Willam ette Meridian:

All of Sections 1 through 24, inclusive.

In Township 3 North, Range 24 East of the Willam ette Meridian:

All of Sections 1 through 36, inclusive.

In Township 4 North, Range 24 East of the Willam ette Meridian:

All of fractional Sections 7, 8, 9 and 10.

All of fractional Sections 15, 16, 17 and 18 ex cept the relocated rights of way for Oregon Washington Railway and Navigation Company (Union Pacific Railroad) and for relocated United States Highway No. 30.

All of Sections 19, 20, 22, 27, 28, 29, 30, 31, 32 33, 34, 35 and 36.

The South Half (S-½) of Section 25.

The South Half (S-½) of Section 26.

The following described property in Gilliam County Oregon:

In Township 3 North, Range 22 East of the Willam ette Meridian:

In Section 1:

All of that portion of the East Half (E-½) of said Section 1 which lies Easterly of the State Highway No. 74 as it is now situated.

In Section 12:

The East Half of the East Half (E-½ E-½) of said Section 12.

All of Sections 24 and 25.

In Section 26:

The Northeast Quarter of the Northwest Quarter (NE-¼ NW-¼) and the East Half of the East Half (E-½ E-½) of said Section 26.

In Section 35:

All of that portion of the East Half of the Northeast Quarter (E-½ NE¼) of said Section 35 which lies Easterly of State Highway No. 74 as it is now situated.

In Section 36:

All of that portion of the North Half (N-½), the North Half of the South Half (N-½ S-½) and the South Half of the Southeast Quarter (S-½ SE¼) of said Section 36 which lies Easterly of State Highway No. 74 as it is now situated.

In Township 4 North, Range 22 East of the Willamette Meridian:

In Section 25:

All of that portion of said Section 25 lying Easterly of State Highway No. 74 as it is now situated and lying Southerly of the right of way for relocated United States Highway No. 30.

In Section 36:

All of that portion of the East Half (E-½) and the East Half of the Northwest Quarter (E-½ NW-¼) of said Section 36 lying Easterly of State Highway No. 74 as it is now situated.

SUPPLEMENT TO LEASE

THIS AGREEMENT, Made as of the 13th day of December, 1963, as a supplement to that certain Lease ("the Lease") dated July 2, 1963, wherein THE BOEING COMPANY, a Delaware corporation, as Lessee, leased from the STATE OF OREGON, acting by and through its State Land Board, as Lessor, certain lands described in Schedule A annexed to the Lease, in Gilliam and Morrow counties, Oregon, known as the Boardman Space Age Industrial Park, witnesseth that:

RECITALS

A. The State has now acquired title to the premises described in the Lease.

B. The condition of the State's title does not conform in all respects with the provisions of Schedule B of the Lease.

C. Administrative control of the premises covered by the Lease has been transferred to the Director of Veterans' Affairs of the State of Oregon by Oregon Laws, 1963, Special Session, Chapter 7.

COVENANTS AND AGREEMENTS

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements ex-

pressed hereinafter and for other good and valuable considerations, The Boeing Company ("the Company") and the State of Oregon, acting by and through its Director of Veterans' Affairs ("the State") agree as follows:

1. *Revised Schedule B.* Revised Schedule B dated December 13, 1963 ("Revised Schedule B"), and attached hereto, is hereby substituted for the original Schedule B attached to the Lease, and wherever the term "Schedule B" is used in the Lease it shall be deemed to refer to Revised Schedule B.

2. *Covenants by the State.* Notwithstanding the inclusion in Revised Schedule B of the exceptions and reservations set forth in this paragraph 2, and regardless of whether or not the Company accepts possession of the premises with knowledge of such exceptions and reservations, the State hereby covenants as follows:

(a) The State will use its best efforts to acquire the mineral rights reserved by the United States of America, set forth in paragraph A of Article VIII of Revised Schedule B.

(b) In the event the Company notifies the State that the exercise of the rights, reserved by the United States of America, acting by and through the Secretary of the Army, to clear, borrow, exca-

vate and remove rocks, soil and other similar materials, said reserved rights being more particularly described in paragraph B of Article VII of Revised Schedule B, interferes or threatens to interfere with the Company's use or intended or desired use of the premises, the State shall use its best efforts to make available to the United States of America a satisfactory substitute source of rock, soil or other materials and to acquire from the United States of America the reserved rights which are the subject of this paragraph (b).

(c) As soon as the United States of America acquires title to the present right of way of the Oregon-Washington Railroad & Navigation Company (Union Pacific Railroad) on the leased premises, the State shall acquire said right of way.

Failure of the State to perform its obligations pursuant to this paragraph 2 shall constitute a breach of the State's covenant of quiet and peaceful possession, use and enjoyment pursuant to subparagraph 4(a) of Article II of the Lease.

3. If the title insurance report and commitment provided to the Company pursuant to paragraph 1 of Article I of the Lease contains an exception limiting the obligation of the title insurer for costs, attorneys' fees and expenses of litigation commenced on or before De-

cember 1, 1968, to contest or establish the constitutionality or legality of the laws under which the Lease was entered into and the validity of the Lease, the Company may deduct from rental payments becoming due to the State under the Lease all reasonable costs, attorneys' fees and expenses incurred by or for the account of the Company in connection with such litigation.

4. The Lease shall in all other respects remain in full force and effect.

IN WITNESS WHEREOF The parties hereto have caused this instrument to be executed by their duty authorized and empowered officers, this 14th day of December, 1963.

Attest:

H. O. Cake

(Seal) THE BOEING COMPANY

By William M. Allen
Lessee

STATE OF OREGON, acting by and through its Director of Veterans' Affairs

By H. C. Saalfeld
Lessor

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

On this 17th day of December, 1963, before me, the undersigned, a Notary Public in and for the State of Washington duly commissioned and sworn, personally appeared William M. Allen, to me known to be the President of THE BOEING COMPANY, the corporation that executed the foregoing instrument, and acknowledged the said instument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he is authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

WITNESS My hand and official seal hereto affixed, the day and year in this certificate above written.

Harry L. Blangy Jr.
(Seal) Notary Public in and for the State of Washington, residing in Seattle.

STATE OF OREGON)
) ss
County of Multnomah)

On this 14th day of December, 1963, before me, a notary public in and for said county and state, personally appeared the within-named H. C. SAALFELD, to me known to be the Director of Veterans' Affairs of the

State of Oregon, who being first duly sworn did say that he executed the foregoing instrument on behalf of the STATE OF OREGON and by authority of his office; and said H. C. Saalfeld acknowledged the execution of said instrument to be the free act and deed of said State of Oregon.

IN TESTIMONY WHEREOF I have hereunto set my hand affixed my official seal, the date in this my certificate above written.

Grant T. Anderson
(Seal) Notary Public for Oregon
My commission expires 7/24/67

APPENDIX B

Below is set forth pp. 2 and 3 of the transcript of the pre-trial hearing in *United States v. Ellis*, No. 63-289 (D. Ore. 1964), *appeal dismissed by stipulation*, No. 19763 (9th Cir. 1965), in which an oral ruling was made.

THE COURT: No. 63-289, U. S. vs. Ellis.

MR. HESS, JR: We have prepared a rough draft of pre-trial order. We haven't had the chance yet to present it to Mr. Buley.

THE COURT: I think maybe I can assist you somewhat. The legal problem has been before me for some

time now, and I am inclined to go along with the rul of the highest and best use in the foreseeable future. C course, that is just going back to the general rule. I rec ognize that the Government has presented this othe problem with reference to the navigational project, an certainly under certain types of claims, such as a clair for a business site along the river, the Supreme Cour has held that as against the United States in all proba bility that type of claim should not be submitted. But am personally convinced that the great mass of legis lation in connection with the development of water an the use of waters in the West have indicated an intentio on the part of Congress that as to that particular type c use, the highest and best use, there may be some valu there. At least, it is a matter that should, in my opinion be submitted to the jury.

Now it is your claim, as I generally understand it that this property has some value by reason of its loca tion in the vicinity of the river and for probable agricul tural uses of the water; is that correct?

MR. HESS, JR: Yes, Your Honor.

THE COURT: You are making no claims for a com mercial use, such as along the river, because if that i so, I believe the Supreme Court has said that the naviga tion rights of the United States are superior to any clain that has not been developed.

MR. HESS, JR: Your Honor, in that connection we believe it is correct that there would be no compensable right for direct access to the river from this property, but the fact that there may be other facilities located in the general area of this property that have to do with water transportation would be a factor that the jury could consider.

THE COURT: You know generally my feeling on it. You can prepare your witnesses along that line. But do not get into the field generally that they might have access there so that you could build docks, or such matters as that.

MR. HESS, JR: No, not on this particular land.

THE COURT: I will not submit that.

MR. HESS, SR: Your present thinking along that line, or your present ruling, is that we have a right to access to it for—

THE COURT: The highest and best use. You can mention the access and the highest and best use for the development, without getting into the navigable field. Once you get into that, then you are in difficulty.